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## Award of the Costs of Taking an Appeal in the Third Circuit

Ellen Wertheimer

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1986]

## AWARD OF THE COSTS OF TAKING AN APPEAL IN THE THIRD CIRCUIT\*

ELLEN WERTHEIMER†

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### I. INTRODUCTION

VIRTUALLY all federal appeals involve the question of costs because prevailing parties are usually entitled to the award of costs upon resolution of the appeal. Obtaining a cost award is of increasing importance, since such costs often can mount into the thousands of dollars.

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The rules for obtaining an award of appellate costs, however, are surprisingly inaccessible, making the procedure a potential pitfall for all but the most experienced appellate advocate. The Federal Rules of Appellate Procedure provide the starting point, but there are many other sources, both statutory and decisional, that must be consulted before a complete award may be obtained.

This article discusses the award of costs in the United States Court of Appeals for the Third Circuit: who pays them and under what circumstances; what items are taxable as costs; when costs will be assessed as a penalty; and how to secure or dispute their award. The purpose of the article is to provide practitioners with the basic information needed to apply for, obtain, or oppose cost awards in the Third Circuit.

The provisions of rule 39 of the Federal Rules of Appellate Procedure<sup>1</sup> are the starting point for determining when appellate

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1. FED. R. APP. P. 39. Rule 39 provides:

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of

costs will be awarded since the Third Circuit has no local rules concerning the awarding of costs. This article takes into account the revisions of the Federal Rules of Appellate Procedure through March 10, 1986.

## II. WHO PAYS THE COSTS?

### A. General Considerations

If an appeal is dismissed, for whatever reason, the appellant (the party bringing the appeal) shoulders the costs of the appeal unless the parties agree otherwise,<sup>2</sup> or the court orders payment by one of the other parties.<sup>3</sup> The Third Circuit has exercised this discretion on a number of occasions. In one case, the Third Circuit required the appellee to contribute to the cost of printing the record despite dismissal on appeal for lack of jurisdiction.<sup>4</sup> The court's division of costs resulted from its belief that the appellee had requested a record which was far more extensive than was necessary for the court to decide the issue.<sup>5</sup> In an admiralty case, however, the Third Circuit denied costs to either party because the parties failed to provide an adequate appendix.<sup>6</sup>

When a judgment is affirmed on appeal, the costs are taxed against the appellant unless otherwise ordered by the court.<sup>7</sup>

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the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

*Id.*

2. FED. R. APP. P. 39(a). The Third Circuit has noted that it is not bound to assess costs in accord with the parties' agreement since the parties cannot deny the court's power under rule 39 to assess costs. See *In re Penn Cent. Transp. Co.*, 630 F.2d 183 (3d Cir. 1980) (court found no evidence of agreement that trustees would bear cost of printing appendices). For a further discussion of *Penn Central*, see *infra* notes 73-76 & 91-92 and accompanying text.

3. FED. R. APP. P. 39(a). For the text of rule 39, see *supra* note 1.

4. *Missouri-Kansas Pipeline Co. v. United States*, 108 F.2d 614 (3d Cir. 1939) (decided under former Third Circuit Court Rule 29), *cert. denied*, 309 U.S. 687 (1940).

5. 108 F.2d at 615. In *Missouri-Kansas Pipeline*, the transcript consisted of 1486 pages but the appellant only printed 361. *Id.* The appellee printed the balance. *Id.* Since such an extensive record was not necessary, three-fourths of the printing costs were taxed to the appellee. *Id.*

6. *The Chickie*, 141 F.2d 80 (3d Cir. 1944). In *Chickie*, the parties failed to provide an appendix as required by the court rules. *Id.* at 86. The court was forced to rely on the transcripts of the court below, as the parties had not provided the pleadings, which were important to the limited liability issue in the case. *Id.*

7. FED. R. APP. P. 39(a). See also *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881 (C.C.P.A. 1969). In *Morehouse*, 20 pages of printed record

When a judgment is reversed, costs are assessed against the appellee.<sup>8</sup>

In an appeal in which the lower court is affirmed in part and reversed in part, or in which a judgment is vacated, the court will exercise its discretion to determine who is to pay the costs on appeal. Rule 39 provides that "costs shall be allowed only as ordered by the court."<sup>9</sup> Rule 39(a) reflects the difficulty of determining who is the prevailing party where each party has prevailed on at least one issue. This difficulty means that no automatic rule is workable.

Where the losing party in a suit involving the United States has proceeded *in forma pauperis*,<sup>10</sup> courts have required that the

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were added at the request of the appellee. *Id.* at 889. Since the court found the material pertinent and helpful in understanding the issues, the court taxed the printing costs against the appellant. *Id.* For the text of rule 39, see *supra* note 1.

8. FED. R. APP. P. 39(a). For the text of rule 39(a), see *supra* note 1.

9. FED. R. APP. P. 39(a). See also *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 1319 (5th Cir. 1979). In *Trainer*, the court ordered the clerk to assess costs one-half against the defendant and one-half against one of two plaintiffs. *Id.* *Trainer* involved a petition to set aside an order of the Benefits Review Board ("Board") awarding death benefits under the Longshoremen's and Harbor Workers' Compensation Act. *Id.* at 1308. The Fifth Circuit affirmed the award of benefits to the child of the deceased. *Id.* at 1309. The court vacated the award to the widow of the deceased and remanded the case to the Board for further determinations. *Id.* Thus, the court directed the clerk to assess costs under the rule 39 provisions only against the defendant and the widow of the deceased. See *id.* at 1319 & n.20.

There are other situations in which courts have exercised their discretion with regard to the award of costs. See, e.g., *Long v. IRS*, 596 F.2d 362, 370 (9th Cir. 1979) (under Freedom of Information Act, it is for district court to decide whether plaintiff "substantially prevailed," allowing award of costs against United States), *cert. denied*, 446 U.S. 917 (1980); *Jones v. Schellenberger*, 225 F.2d 784, 794 (7th Cir. 1955) (court's discretion exercised to "fullest extent" against prevailing party whose conduct prolonged litigation and increased costs), *cert. denied*, 350 U.S. 989 (1956); *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977) (non-prevailing parties allowed costs based on policy considerations; decided under FED. R. CIV. P. 54(d)); *Bourazak v. North River Ins. Co.*, 280 F. Supp. 87 (S.D. Ill. 1968) (court of appeals in proper case may exercise its discretion and tax prevailing party).

10. *In forma pauperis* describes the permission given to a poor litigant to proceed without liability for court fees or costs, if the court is satisfied as to his or her indigence. See *Phillips v. Louisville & Nashville R.R. Co.*, 153 F. 795, 797 (C.C.N.D. Ala. 1907) (*in forma pauperis* statutes are intended to permit litigants, who are unable in good faith to prosecute suit on account of poverty, to obtain fair adjudication of their rights), *aff'd*, 164 F. 1022 (1908). For a discussion of the English common law origin of the *in forma pauperis* doctrine, see *Cook v. Imperial Tobacco Co.*, [1922] 2 L.J.K.B. 771.

The federal *in forma pauperis* statute provides:

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security thereof, by a person who makes an affidavit that he is unable to pay

government pay its own costs.<sup>11</sup>

Where an appeal involves multiple parties, the court in its discretion will determine who is to pay the costs.<sup>12</sup> Intervenor will be awarded costs only if they have made a "substantial" contribution to the resolution of the issues.<sup>13</sup> The United States

such costs or give security thereof. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

28 U.S.C. § 1915(a) (1982). The statute also provides that the expense of printing the record on appeal, when required by the appellate court, will be borne by the United States if the litigant presents an affidavit. *Id.* § 1915(b). Subsections (c), (d), and (e) of the statute deal with the procedural aspects of the rule. *See* 28 U.S.C. § 1915(c), (d), (e) (1982). For a general discussion of § 1915, see C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2673 (1983); Comment, *Petitions to Sue In Forma Pauperis in Federal Courts: Standards and Procedures for the Exercise of Judicial Discretion*, 56 B.U.L. REV. 745 (1976).

11. *See* *Henry v. United States*, 424 F.2d 677, 679 (5th Cir. 1970). *Henry* involved an action by the government to recover under the False Claims Act for fraudulent sale of pine oil disinfectant. *Id.* at 678 (citation omitted). The district court awarded damages to the United States upon a finding that the defendant partnership submitted five false invoices to the government. *Id.* at 678. Leave to appeal *in forma pauperis* was granted to one of the partners. *Id.*

On appeal, the court concluded that the assets of the partnership could be reached because one of the partners had committed fraud. *Id.* at 679. The court decided, however, that the appellant's personal assets could not be reached as she did not contribute to the fraud. *Id.* The case was remanded to the district court only to assess the actual damages against the appellant individually. *Id.* The government was directed to pay its own costs as the appeal was heard *in forma pauperis*. *Id.*

Under rule 39(b) of the Federal Rules of Appellate Procedure, costs may only be assessed against the United States when authorized by statute. FED. R. APP. P. 39(b). For a discussion of rule 39(b), see *infra* notes 21-28 and accompanying text.

12. *See* *Mobile Power Enters. v. Power Vac, Inc.*, 496 F.2d 1311 (10th Cir. 1974) (settlement between plaintiff and one codefendant did not transform other codefendant, in whose favor no judgment was entered, into a "prevailing party"); *Modick v. Carvel Stores, Inc.*, 209 F. Supp. 361 (S.D.N.Y. 1962) (costs were properly assessed against unsuccessful plaintiff even though his claim was consolidated with that of successful plaintiff for trial).

13. *See* *Delta Airlines v. Civil Aeronautics Bd.*, 505 F.2d 386 (D.C. Cir. 1974). In *Delta*, the court recognized that costs on appeal are taxed in accordance with rule 39. *Id.* at 387. The court noted, however, that "situations inevitably arise in which the rule is not specifically dispositive." *Id.* The court determined that rule 39 favors taxing costs in favor of the prevailing party, but stated that beyond this, taxation of costs is a matter within the court's discretion. *Id.* The court reviewed the manner in which other circuits assessed costs for or against intervenors, finding that the majority of circuits treated intervenors "like any other prevailing or losing party," and concluded that the intervenors could recover costs as prevailing parties who "substantially contributed" to the resolution of the case. *Id.* at 377-88 (citations omitted). *See also* *American Public Gas Ass'n v. Federal Energy Regulatory Comm'n*, 587 F.2d 1089 (D.C. Cir. 1978) (no substantial contribution since briefs of intervenors were duplicative of brief of Federal Energy Regulatory Commission); C. WRIGHT & A. MILLER, *supra* note 10, § 2667, at 191.

Court of Appeals for the Seventh Circuit, for example, has held that if the intervenors have made a substantial contribution, the court then will

consider whether the amount claimed should be reduced to reflect [an] estimate of the value of the contribution and the extent to which the brief for which costs are claimed, despite its original contribution, contained materials duplicative of material in the [original party's] presentation. . . . [A]wards of costs in favor of intervenors in such cases will not be favored.<sup>14</sup>

The Third Circuit has used other cost adjusting measures, and has held that a party that prevails in a mandamus action is entitled to costs and that costs should be assessed in the same manner as the district court assesses costs under rule 54(d) of the Federal Rules of Civil Procedure.<sup>15</sup> However, the judge, a nominal respondent in mandamus, will not be responsible for these costs.<sup>16</sup> Further, in a bankruptcy case, the Third Circuit has held that receivers may not collect costs from the bankrupt party.<sup>17</sup>

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14. *American Ry. Supervisor's Ass'n v. United States*, 582 F.2d 1066, 1067 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). In *American Railway*, the court applied this standard and denied the railroads' application for costs. 582 F.2d at 1067. The *American Railway* case involved a petition for rehearing on the issue of costs previously granted in favor of the railroads as intervenors against the American Railway Supervisors' Association. *Id.* On rehearing, the court granted the railroads' costs only in accordance with their contribution as intervenors. *Id.* at 1068. The court stated that, although the intervenors' brief similarly explained the reasons for the regulation at issue in the case, the brief made a substantial contribution to the clarity of the rule at issue. *Id.*

Other courts have also applied the "substantial contribution" standard. See *American Trucking Ass'n v. Interstate Commerce Comm'n*, 666 F.2d 167 (5th Cir. 1982) (intervenors whose brief added little to case were to bear their own costs, while intervenors who made successful attacks on regulations were awarded costs accordingly); *American Public Gas Ass'n v. Federal Energy Regulatory Comm'n*, 587 F.2d 1089 (D.C. Cir. 1978) (no substantial contribution as briefs were identical).

15. *Cotler v. Inter-County Orthopaedic Ass'n*, 530 F.2d 436 (3d Cir. 1976). In *Cotler*, the court recognized that rule 39 does not expressly provide for the assessment of costs in a mandamus proceeding. *Id.* at 538. The court noted that mandamus jurisdiction is conferred by the All Writs Act as an original action at law. *Id.* at 538 (citing 28 U.S.C. § 1651 (1976)). The court concluded that there is no reason why costs should not be awarded as in any action at law. *Id.* at 538. See also *Arizona v. United States Dist. Court for the Dist. of Ariz.*, 709 F.2d 521 (9th Cir. 1983) (citing *Cotler* in awarding costs in mandamus action).

16. *Cotler v. Inter-County Orthopaedic Ass'n*, 530 F.2d 536, 538 (3d Cir. 1976). See also *In re Haight & Freese Co.*, 164 F. 688, 690 (1st Cir. 1980) ("It would be contrary to the fundamental rule protecting the freedom of judicial action to tax costs against a judge . . . [for] failure to apprehend the law correctly.").

17. *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531 (3d Cir. 1970).

The above rules governing the taxation of costs are subject to statutory preemption. Indeed, rule 39(a) by its own terms applies “[e]xcept as otherwise provided by law.”<sup>18</sup> A statute may thus alter the usual award of costs.<sup>19</sup> An example of such an alteration is 28 U.S.C. § 1928, which forbids the award of costs to a successful plaintiff in a patent infringement suit when the patentee claims to be, but turns out not to be, the original inventor and does not file a disclaimer prior to commencement of the action.<sup>20</sup>

Where there is no specific statute governing the particular kind of case on appeal, and no exception applies, courts will adhere to the usual practice of awarding costs on appeal to the prevailing party.

### B. *The United States as a Party*

Rule 39(b) specifically addresses the situation where the

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In *Larchwood*, the receivers (appellees) were appointed by the district court in an action brought by the United States when the corporation defaulted on federal loans. *Id.* at 532. The district court awarded the receivers’ costs. *Id.* The Third Circuit vacated the order and remanded for incorporation of certain amounts it approved. *Id.* On remand, the receivers asked for supplemental costs for expenses on appeal, which costs were awarded by the district court. *Id.* On the second appeal, the Third Circuit determined that the receivers must bear their own costs on appeal. *Id.* at 535. See also *In re Imperial “400” Nat’l, Inc.*, 432 F.2d 232 (3d Cir. 1970) (trustee and his attorney paid cost of brief and docketing fees without reimbursement from debtor’s estate).

18. FED. R. APP. P. 39(a). For the text of rule 39(a), see *supra* note 1.

19. FED. R. APP. P. 39 advisory committee note.

20. 28 U.S.C. § 1928 (1982). Section 1928 specifically provides:

Whenever a judgment is rendered for the plaintiff in any patent infringement action involving a part of a patent and it appears that the patentee, in his specifications, claimed to be, but was not, the original and first inventor or discoverer of any material or substantial part of the thing patented, no costs shall be included in such judgment, unless the proper disclaimer has been filed in the Patent Office prior to the commencement of the action.

*Id.* See also *Gottschalk Mfg. v. Springfield Wire & Tinsel Co.*, 75 F.2d 907 (1st Cir. 1935) (statute applies to district courts, courts of appeals, and Supreme Court).

The United States District Court for the Eastern District of Tennessee reached an interesting result in the “snail darter” case with respect to costs and attorneys’ fees requested by the prevailing party in an action in which the awarding of costs was governed by another federal statute. See *Hill v. Tennessee Valley Auth.*, 84 F.R.D. 226 (E.D. Tenn. 1979). The district court in *Hill* disallowed the award of costs and attorneys’ fees, stating that it was irritated that the plaintiffs petitioned for costs more than two years after the district court’s order, and more than a year after the Supreme Court’s final decision in the case. *Id.* at 227-29. The original action and the request for costs had been filed under the Endangered Species Act, 16 U.S.C. § 1540(g)(4), which allows a court to award costs when “issuing any final order.” 84 F.R.D. at 227.



United States is a party to an appeal.<sup>21</sup> Prior to the enactment of uniform appellate rules, the general view was that no award of costs could be granted in favor of the United States.<sup>22</sup>

### 1. *The United States as a Party in Civil Cases*

The award of costs against the United States is allowed in civil cases by rule 39(b) only when such an award is authorized by law.<sup>23</sup> This authorization is found in 28 U.S.C. § 2412(a),<sup>24</sup> which places the United States on an equal plane with other litigants in civil appeals.<sup>25</sup> Thus, in the absence of a statute to the contrary, the United States may receive an award of costs and also may be subject to paying the costs to the other party-litigants.<sup>26</sup> Consequently, rule 39(b) applies in most civil litigation in which the United States is involved.

### 2. *The United States as a Party in Criminal Cases*

There is statutory authority for the United States to seek the

21. FED. R. APP. P. 39(b). For the text of rule 39(b), see *supra* note 1.

22. Before being amended in 1966, § 2412(a) of title 28 of the United States Code allowed costs to the United States only where provided for by act of Congress. 28 U.S.C. § 2412(a) (1964), amended by 28 U.S.C. § 2412 (Supp. V 1965-1969).

23. FED. R. APP. P. 39(b).

24. 28 U.S.C. § 2412(a) (1982).

25. *Id.* Section 2412(a) provides:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

*Id.*

26. See, e.g., *Citizens Council v. Brinegar*, 741 F.2d 584 (3d Cir. 1984) (Department of Transportation liable for attorneys' fees upon failing to justify omission of environmental impact statement); *Natural Resources Defense Council v. EPA*, 703 F.2d 700 (3d Cir. 1983) (§ 2412 applicable to petition for attorneys' fees incurred in review proceedings pursuant to Clean Water Act); *Collorafi v. United States*, 579 F. Supp. 506 (E.D.N.Y. 1983) (plaintiffs liable for government's costs and expenses where plaintiffs ignored Declaratory Judgment Act and sought declaratory relief in federal tax controversy); *Nunes-Correia v. Haig*, 543 F. Supp. 812 (D.D.C. 1982) (mere absence of bad faith or deliberate abuse does not absolve government of liability for expenses); *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093 (C.D. Cal. 1979) (in view of complex questions of law, court exercised discretionary power to award costs to defendants in Clayton Act proceeding). For a discussion of the development of § 2412, see C. WRIGHT & A. MILLER, *supra* note 10, § 2672, at 236-42.

award of costs against an unsuccessful criminal defendant,<sup>27</sup> but this statute refers only to federal district courts.<sup>28</sup> A successful criminal defendant apparently has no right to have costs imposed against the United States. If the government may obtain its costs at the district court level, then presumably the court of appeals, under rule 39, may award costs of the appeal to the government where appropriate.

## II. COSTS IMPOSED AS A PENALTY

### A. *Liability of Parties for Costs*

Rule 39 generally controls the disposition of costs.<sup>29</sup> However, rule 38 of the Federal Rules of Appellate Procedure should be consulted when appropriate. Rule 38 provides, "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."<sup>30</sup>

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27. See 28 U.S.C. § 1918 (1982). Section 1918 provides:

(a) Costs shall be included in any judgment, order, or decree rendered against any person for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for.

(b) Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution.

*Id.* See also *United States v. Am. Theater Corp.*, 526 F.2d 48 (8th Cir. 1975) (taxation of costs in nondiscriminatory manner under § 1918 does not violate fifth or sixth amendments), *cert. denied*, 430 U.S. 938 (1977); *Bachner v. United States*, 517 F.2d 589 (7th Cir. 1975) (court found it inconceivable that defendant's plea of guilty would have been affected by knowledge of liability for court costs of prosecution).

Specific criminal statutes may also expressly provide that a defendant is liable for the costs of prosecution. See, e.g., 26 U.S.C. § 7201 (1982) (making income tax evasion a felony and imposing fine of not more than \$10,000).

In determining what costs are to be taxed, the court will be guided by 28 U.S.C. § 1920, which applies both to civil and criminal cases. 28 U.S.C. § 1920 (1982). See also *United States v. Procario*, 361 F.2d 683 (2d Cir. 1966) (criminal prosecution for evasion of income tax). The imposition of costs in a criminal proceeding under the authority of § 1918 is discretionary with the government, which must initiate the demand for costs to be imposed. The government is not always successful in obtaining costs. See *United States v. Pommerening*, 500 F.2d 92 (10th Cir.) (court did not grant costs for witnesses who did not testify), *cert. denied*, 419 U.S. 1088 (1974); *United States v. Deas*, 413 F.2d 1371 (5th Cir. 1969) (separate court costs from previous mistrial due solely to jury's failure to agree cannot be taxed to subsequently convicted defendant); *Gleckman v. United States*, 80 F.2d 394 (8th Cir. 1935) (defendants not liable for jury's fees, mileage, bailiffs, jury, lodging, and medical expenses), *cert. denied*, 297 U.S. 709 (1936).

28. See 28 U.S.C. § 1918 (1982). For the text of § 1918, see *supra* note 27.

29. For the full text of rule 39, see *supra* note 1.

30. FED. R. APP. P. 38. In discussing the purposes of rule 38, the Second Circuit has stated, "Rule 38 is not premised on a showing of delay in prosecuting on appeal. . . . Rather the determination is one of doing justice between the

In order for rule 38 to apply, the court first must determine that the appeal was frivolous.<sup>31</sup> A frivolous appeal is one without any arguable merit.<sup>32</sup> Once the court has determined that an appeal is frivolous, it may then invoke the provisions of rule 38 as a means of alleviating the burden imposed upon the party which has had to defend an appeal that should not have been taken.<sup>33</sup>

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parties, of penalizing a party for unnecessarily wasting the time and resources of the court." *Fluoro Elec. Corp. v. Branford Assocs.*, 489 F.2d 320, 326 (2d Cir. 1973) (citations omitted). See generally Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845 (discussing effects of frivolous appeals on workload of appellate courts and preparing new rule requiring sanctions); Oberman, *Federal Courts Commentary—Coping with the Rising Caseload II: Defining the Frivolous Civil Appeal*, 47 BROOKLYN L. REV. 1057 (1981) (detering frivolous appeals protects litigants who have meritorious appeals).

31. FED. R. APP. P. 38.

32. See *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986) (appeal that "from the beginning was utterly without merit"; rule 38 award of attorneys' fees and double costs). See also *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980). The Seventh Circuit in *Ruderer* ruled that in deciding whether to award rule 38 damages, a court of appeals must first determine that the appeal is frivolous, which is "something more . . . than an unsuccessful appeal." *Id.* at 1132 (citation omitted). The court is to determine if the appeal was prosecuted with "no reasonable expectation of altering the district court's judgment and for the purpose of delay or harrassment or out of sheer obstinacy." *Id.* Several circuit courts have ruled that appeals were frivolous. See, e.g., *Sun Ships*, 785 F.2d 59; *United States v. Isenhower*, 754 F.2d 489 (3d Cir. 1985); *Asberry v. United States Postal Serv.*, 692 F.2d 1378 (Fed. Cir. 1982); *Bank of Canton v. Republic Nat'l Bank*, 636 F.2d 30 (2d Cir. 1980); *Self v. Self*, 614 F.2d 1026 (5th Cir. 1980); *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 543 F.2d 1106 (5th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977). For examples of cases in which circuit courts have decided that appeals were not frivolous or brought for delay, see *Sauers v. Commissioner*, 771 F.2d 64, 70 n.9 (3d Cir. 1985); *Howell v. Marmpegaso Compania Naviera*, 536 F.2d 1032 (5th Cir. 1976); *Schokbeton Indus. v. Schokbeton Prod. Corp.*, 466 F.2d 171 (5th Cir. 1972); *Moses v. Washington Parish School Bd.*, 421 F.2d 685 (5th Cir. 1970).

The question of whether an appeal is frivolous often arises in contexts other than the awarding of costs. See, e.g., *Anders v. California*, 386 U.S. 738 (1967). In *Anders*, the Supreme Court discussed guidelines regulating when court-appointed counsel in an *in forma pauperis* case can seek leave to withdraw as counsel once an appeal is taken. *Id.* at 739. In order to allow withdrawal, a court must determine that the appeal raises no questions of arguable merit, or, in other words, that the appeal is wholly frivolous. *Id.* at 744-45. Therefore, in cases raising the issue of whether an appeal is frivolous, instruction may be obtained by looking at *Anders*-type cases. See, e.g., *Government of the Canal Zone v. O'Connor*, 460 F.2d 1004 (5th Cir. 1972) (no merit in appeal and attorney's motion to withdraw granted, as appeal dismissed); *United States v. Crawford*, 446 F.2d 1085 (5th Cir. 1971) (no merit in appeal and attorney's motion to withdraw granted, as appeal dismissed); *United States v. Minor*, 444 F.2d 521 (5th Cir. 1971) (counsel's motion to withdraw appeal of guilty plea granted, citing *Anders*).

33. See *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986) (attorneys' fees and double costs awarded to compensate party defending on appeal); *Clarion Corp. v. American Homes Prod. Corp.*, 494 F.2d 860, 865-66 (7th Cir.), *cert. denied*, 419 U.S. 870 (1974). In *Clarion*, the appellant agreed to

The Third Circuit has awarded attorneys' fees and double costs under 38,<sup>34</sup> although the court has observed that it is also "sensitive to the need for the courts to remain open to all who seek in good faith to invoke the protection of law."<sup>35</sup>

In a case that predated the enactment of rule 38,<sup>36</sup> the Third Circuit exercised its authority under the analogous 28 U.S.C. § 1912<sup>37</sup> to make a rule 38-type award. In that case, the Third Circuit not only declared that the appeal was frivolous but also required that the appellant's brief be stricken from the record for containing "false and scandalous" matter.<sup>38</sup> The court awarded printing fees to the appellees as well as a flat sum to cover attorney fees and related expenses of the appeal.<sup>39</sup>

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a settlement but then refused to execute it. 494 F.2d at 862. The court stated, "Rule 38 was designed to penalize litigants for just such tactics as these and to compensate those who have been put to the expense of answering such wholly frivolous appeals." *Id.* at 865-66. *See also* Whitney v. Cook, 99 U.S. 607 (1878) (Court stated that it will suppress evil of resorting to its jurisdiction upon frivolous grounds by awarding damages); Nevijel v. North Coast Life Ins. Co., 651 F.2d 671 (9th Cir. 1981) (defendant has right to be free from costly, frivolous suits).

34. Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 64 (3d Cir. 1986) (award of attorneys' fees and double costs under rule 38); United States v. Isenhower, 754 F.2d 489, 490 (3d Cir. 1985) (order to show cause why rule 38 damages should not be awarded).

It is also worth noting that the Third Circuit will affirm awards made by district courts pursuant to FED. R. CIV. P. 11. *See* Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156-58 (3d Cir. 1986) (discussion of FED. R. CIV. P. 11); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3d Cir. 1985). *See also* Sauers v. Commissioner, 771 F.2d 64 (3d Cir. 1985) (award of damages for frivolous appeal under 26 U.S.C. § 6673 (1982)).

35. Sauers v. Commissioner, 771 F.2d 64, 70 n.9 (3d Cir. 1985) (quoting Crain v. Commissioner, 737 F.2d 1417, 1418 (5th Cir. 1984)). *See also* Mid-Jersey Nat'l Bank v. Fidelity Mortgage Investors, 518 F.2d 640, 642 n.1 (3d Cir. 1975) (appeal not "so devoid of merit as to warrant an award of damages for bringing a frivolous appeal"); United States *ex rel.* Soda v. Montgomery, 269 F.2d 752, 758 (3d Cir. 1959). In *Soda*, which preceded the enactment of rule 38, and which was decided under a local rule that gave damages for delay, the court refused to award delay damages but with the following caveat: "while the full record reveals little real excuse for this second appeal, enforcement of the [delay damages] rule is discretionary. We will withhold its application in this instance. This is not to be at all interpreted as any precedent for the future in a comparable situation." *Id.*

36. Ginsburg v. Stern, 295 F.2d 698 (3d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

37. 28 U.S.C. § 1912 (1982). Section 1912 provides that when a judgment is affirmed by the Supreme Court or a court of appeals, the court has the discretion to allow the prevailing party "just damages for his delay, and single or double costs." *Id.* For a discussion of the history of this legislation, see Martineau, *supra* note 30, at 857-58.

38. 295 F.2d at 698.

39. *Id.* Other circuits as well as the Third Circuit have applied rule 38 and determined that certain appeals were frivolous. *See, e.g.*, TIF Instruments, Inc. v.

Once an appeal is determined to be frivolous, the court will then either dismiss the appeal<sup>40</sup> or affirm the appealed decision.<sup>41</sup> In either instance, the appellee as the prevailing party will be entitled to costs.

A court may impose double costs as a penalty for bringing a frivolous appeal,<sup>42</sup> and may also impose damages unrelated to the amount of costs.<sup>43</sup>

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Colette, 713 F.2d 197 (6th Cir. 1983) (failure to conduct discovery or answer interrogatories); McCoy v. Gordon, 709 F.2d 1060 (5th Cir. 1983) (appeal lacks all substance); Collins v. Amoco Prod. Co., 706 F.2d 1114 (11th Cir. 1983) (in light of Supreme Court's determination that order denying disqualification motion is not appealable, attempted appeal was frivolous); General Brewing Co. v. Law Firm of Gordon, Thomas, Honeywell, Malanea, Peterson & O'Hearn, 694 F.2d 190 (9th Cir. 1982) (appellant distorted trial court record); Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893 (2d Cir. 1982) (order not final and thus unappealable because plaintiff's claim for damages was still pending); *In re* Newport Harbor Assocs., 589 F.2d 20 (1st Cir. 1978) (failure to comply with six-month limitation period which is prerequisite to relief); White v. United States, 588 F.2d 650 (8th Cir. 1978) (plaintiff unable to present his claims intelligibly); Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.) (delay in discharge of matters), *cert. denied*, 439 U.S. 833 (1978); Mancuso v. Indian Harbor Belt R.R., 568 F.2d 553 (7th Cir. 1978) (finding most of material in appellant's brief irrelevant); Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972) (plaintiff pressed appeal notwithstanding clear law to contrary).

40. *See, e.g.*, Asberry v. United States Postal Serv., 692 F.2d 1378 (Fed. Cir. 1982); Bank of Canton v. Republic Nat'l Bank, 636 F.2d 30 (2d Cir. 1980); Exhibitors' Poster Exch., Inc. v. National Screen Serv. Corp., 543 F.2d 1106 (5th Cir.), *cert. denied*, 431 U.S. 938 (1977); United States v. Eads, 480 F.2d 131, 133 (5th Cir. 1973); Government of the Canal Zone v. O'Connor, 460 F.2d 1004 (5th Cir. 1972); Willis v. United States Bd. of Parole, 451 F.2d 659 (5th Cir. 1971); United States v. Minor, 444 F.2d 521, 522 (5th Cir. 1971). *See also* Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 867-70 (3d Cir. 1984) (discussion of sanction; court emphasized extreme nature of dismissal as sanction but ruled that district court did not abuse its discretion in dismissing case).

*In re* Universal Minerals, Inc., 755 F.2d 309 (3d Cir. 1985), the Third Circuit repeatedly directed counsel for the appellant to respond to appellee's jurisdictional argument. Counsel failed to respond, and the court stated that this failure warranted dismissal of the appeal. *Id.* at 313.

41. *See, e.g.*, McCoy v. Gordon, 709 F.2d 1060 (5th Cir. 1983); Collins v. Amoco Prod. Co., 706 F.2d 1114 (11th Cir. 1983); Mancuso v. Indian Harbor Belt R.R., 568 F.2d 553 (7th Cir. 1978); Clarion Corp. v. American Home Prod. Corp., 494 F.2d 860, 865-66 (7th Cir.), *cert. denied*, 419 U.S. 870 (1974); Fluoro Elec. Corp. v. Branford Assoc., 489 F.2d 320, 326 (2d Cir. 1973); Lightfoot v. Weis, 213 F.2d 847, 848 (5th Cir. 1954).

42. Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 64 (3d Cir. 1986); United States v. Nesglo, Inc., 744 F.2d 887, 892 (1st Cir. 1984); *see also* Savers v. Commissioner, 771 F.2d 64, 70 n.9 (3d Cir. 1985).

43. *See, e.g.*, *In re* Hartford Textile Corp., 659 F.2d 299 (2d Cir. 1981) (\$5000 imposed for damages), *cert. denied*, 455 U.S. 1018 (1982); Ruderer v. Fines, 614 F.2d 1128, 1133 (7th Cir. 1980) (\$2,500 in damages imposed and double costs); Browning Debenture Holders' Comm. v. DASA Corp., 605 F.2d 35, 40-41 (2d Cir. 1978) (\$2,500 damages and double costs). *But see* Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 931 (2d Cir. 1979) (frivolous appeal, but damages and costs denied to appellee who based rule 38 claim

In addition, rule 38 allows attorneys' fees as one form of sanction against a party bringing an appeal that does not merit appellate attention.<sup>44</sup> Although rule 38 does not specifically mention attorneys' fees,<sup>45</sup> some circuits, including the Third Circuit, have construed rule 38 as allowing the award of attorneys' fees to

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on statements made by opposing counsel at pre-argument conference), *cert. denied*, 444 U.S. 1076 (1980).

44. FED. R. APP. P. 38 advisory committee note.

45. For the text of rule 38, see *supra* text accompanying note 30. Under rule 39, attorneys' fees are not considered "costs." This is the "American" rule. See *Market v. Chesny*, 105 S. Ct. 3012, 3016 (1985) ("[u]nlike in England, such costs generally had not included attorney's fees"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (American rule traditionally required each party in lawsuit to bear own attorneys' fees).

Federal courts are no longer permitted to employ their equitable powers to award attorneys' fees to litigants under a "private attorney general doctrine." See *Alyeska*, 421 U.S. at 209. In *Alyeska*, the Court stated:

Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former.

*Id.* at 263-64. See generally Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 284-85 (1981) (discussing federal courts' adoption of doctrine in the early 1970s in response to limitations of common benefit and bad faith exceptions).

There are certain exceptions to the American rule. See *Rothenberg v. Security Management Co.*, 736 F.2d 1470, 1471 (1984) (courts have developed bad faith exception so that fees will be awarded if attorney acted in "bad faith vexatiously, wantonly, or for oppressive reasons") (citation omitted). See also Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 209-10 (1983) (recognizing current exceptions as: fee-shifting pursuant to contract, penalty for bad faith conduct or wilful violation of court order, statutory and common fund and benefit exceptions); Note, *supra*, at 281-84 (discussing bad faith exceptions).

The majority of the exceptions to the American rule are statutory, however. See generally, *Marek*, 105 S. Ct. at 3036-39 (Brennan, J., dissenting) (listing over 100 fee-shifting statutes); Note, *supra*, at 286 ("Because the *Alyeska* Court . . . rejected the private attorney general rationale, express statutory fee authorization has become the primary vehicle through which attorney's fees may be awarded in the federal court system."). It has been suggested that the most significant of these statutes is the Civil Rights Attorney's Fees Awards Act of 1976 (Fee Awards Act), 42 U.S.C. § 1988 (1982) (as amended by Pub. L. No. 96-481, 94 Stat. 2330 (1980)). Note, *supra*, at 287-88. The Third Circuit recently awarded attorney's fees under the Fee Awards Act in *Helm v. Hewitt*, 780 F.2d 367, 368 (3d Cir. 1986).

Counsel should also be alert to the possibility that attorneys' fees may be available as part of the costs in a given case. See *Marek*, 105 S. Ct. at 3036 (Brennan, J., dissenting). See also Green, *supra*, at 259-68.

Where attorneys' fees are available, they will probably be calculated using the "lodestar" technique in the absence of statutes to the contrary. See *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973). For a discussion of *Lindy*, see *infra* notes 53-56 and accompanying text.

the party defending a frivolous appeal.<sup>46</sup> Some of these courts reason that the expense of attorneys' fees is an injury suffered by a party compelled to defend against a frivolous appeal, and that compensation for such expense is an element of "just damages" awardable under rule 38.<sup>47</sup> Many of the cases awarding attorneys' fees that were decided under rule 38 simply state a brief conclusion as to the propriety of such an award, and alternatively ground the decision on rule 38 alone<sup>48</sup> or on rule 38 in conjunction with 28 U.S.C. § 1912.<sup>49</sup> An award of attorneys' fees is re-

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46. See, e.g., *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986); *TIF Instruments, Inc. v. Colette*, 713 F.2d 197 (6th Cir. 1983) (awarding costs and attorneys fees, amount to be determined on remand); *Standridge Flying Serv. v. Department of Transp.*, 712 F.2d 1223 (8th Cir. 1983) (awarding damages under rule 38 of costs and attorney's fees); *Bank of Canton v. Republic Nat'l Bank*, 636 F.2d 30 (2d Cir. 1980) (awarding damages of \$5,000 or expenses, including counsel fees, whichever is less); *Church of Scientology v. McLean*, 615 F.2d 691 (5th Cir. 1980) (damages include reasonable attorney fees). But see *Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1115 n.4 (8th Cir. 1977) (rule 38 damages for attorneys' fees denied because, although the appeal bordered on frivolous, no finding of bad faith was made). For cases decided before the enactment of the Federal Rules of Appellate Procedure, see *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221-24 (9th Cir.) (not abuse of discretion for trial court to award \$100,000 attorneys' fees in antitrust suit), *cert. denied*, 379 U.S. 880 (1964); *Zurich Ins. Co. v. Sigourney*, 278 F.2d 826, 830 (9th Cir. 1960) (\$1,500 attorneys' fees awarded for services on appeal); *Ginsburg v. Stern*, 295 F.2d 698 (3d Cir. 1961) (\$500 attorneys' fees awarded for frivolous appeal), *cert. denied*, 368 U.S. 987 (1962); *White v. Bruce*, 109 F.355, 366 (5th Cir. 1901) (court declined to decide whether attorneys' fees should be assessed in suit based on writ of error, but court refused such fees in this case).

47. See *Standridge Flying Serv. v. Dep't of Transp.*, 712 F.2d 1223 (8th Cir. 1983) (court granted reasonable attorneys' fees of \$2,060 incurred by appellee in connection with frivolous appeal; fees were granted under court's rule 38 power); *Bank of Canton v. Republic Nat'l Bank*, 636 F.2d 30 (2d Cir. 1980) (under rule 38 court granted double costs and damages or actual expenses of appeal, including counsel fees, whichever sum was less); *Church of Scientology v. McLean*, 615 F.2d 691 (5th Cir. 1980) (under rule 38 court granted double costs and damages to appellee, including reasonable attorney's fees).

48. See *TIF Instruments, Inc. v. Colette*, 713 F.2d 109 (6th Cir. 1983) (attorney held liable for portion of costs and attorneys' fees awarded solely under rule 38 against client); *Standridge Flying Serv. v. Department of Transp.*, 712 F.2d 1223 (8th Cir. 1983) (damages of costs and reasonable attorneys' fees awarded solely under rule 38); *Sunset Plaza, Inc. v. Davies*, 546 F.2d 232 (8th Cir. 1976) (attorneys' fees assessed against secured creditor solely under rule 38). The Third Circuit's decision in *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986) contains a detailed discussion of the propriety of its award.

49. 28 U.S.C. § 1912 (1982). Section 1912, like rule 38, does not specifically mention attorneys' fees. See *id.* Section 1912 provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." *Id.* See also *Overmyer v. Fidelity & Deposit Co.*, 554 F.2d 539,

served for particularly egregious cases,<sup>50</sup> unless authorized by statute. An example of a statutory award of attorneys' fees is their award in age discrimination suits when the employee prevails.<sup>51</sup>

When the district court awards attorneys' fees, review on appeal is limited to a consideration of whether the district court

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543 (2d Cir. 1977). The *Overmyer* court awarded double costs and attorneys' fees under its rule 38 and § 1912 discretion. *Id.*

In *Overmyer*, a New York state court entered judgment against the plaintiffs. The state court also directed the plaintiffs to indemnify a surety on an appeal bond seeking injunctive relief and damages against the surety. *Id.* The United States District Court for the Southern District of New York granted the surety's motion to dismiss. *Id.* The Second Circuit determined that the appeal was frivolous as the claims could have been brought before a state court. *Id.* at 543. Thus, the court stated that it would award double costs and attorney's fees under its rule 38 and § 1912 discretion. *Id.* For examples of other cases decided under the courts' § 1912 authority, see *Exhibitors Poster Exch. v. Nat'l Screen Serv. Corp.*, 543 F.2d 1106, 1107 (5th Cir. 1976) (case remanded to determine amount of costs and damages to be awarded to appellees under § 1912), *cert. denied*, 431 U.S. 938 (1977); *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir.) (appeal frivolous and appellee awarded double costs under § 1912 authority), *cert. denied*, 382 U.S. 814 (1965); *Ginsberg v. Stern*, 295 F.2d 698 (3d Cir. 1961) (frivolous appeal), *cert. denied*, 368 U.S. 987 (1962).

50. See *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986) (appeal "that from the beginning was utterly without merit"); *Overmyer v. Fidelity & Deposit Co.*, 554 F.2d 539, 543 (2d Cir. 1977) ("This court has been utilized . . . as a device to frustrate the collection of a judgment of a state court."); *In re Sunset Plaza, Inc.*, 546 F.2d 232, 234 n.1 (8th Cir. 1976) (in bankruptcy proceeding, court noted that record disclosed "nonsensical whipsaw appeals" over course of seven-year litigation that included over 700 pleadings); *Exhibitors Poster Exch. v. Nat'l Serv. Corp.*, 543 F.2d 1100, 1106-07 (5th Cir. 1976) (sole issue had been litigated and appealed before; appellant merely had "forlorn hope" that court would overrule earlier decision), *cert. denied*, 431 U.S. 938 (1977); *Monroe Auto Equip. Co. v. NLRB*, 511 F.2d 611 (5th Cir. 1975) (arguments clearly contrary to congressional policy and caselaw); *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir.) (appeal "potentially" frivolous), *cert. denied*, 382 U.S. 814 (1965). *Cf.* *Dow Chem. Co. v. M/V Gulf Seas*, 593 F.2d 613, 614-15 (5th Cir. 1979) (distinguishing cases where appeal was "potentially frivolous").

51. 29 U.S.C. § 626(b) authorizes the award of attorneys' fees in age discrimination suits. 29 U.S.C. § 626(b) (1982). See also *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977) (remanded for recalculation of attorney fee award to reflect value of time devoted to case, noting that 29 U.S.C. § 626(b) incorporates 29 U.S.C. § 216(b), which allows for attorneys' fees under Fair Labor Standards Act); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977) (awarding attorneys' fees), *cert. denied*, 434 U.S. 1022 (1978), *rev'd on other grounds sub nom.* *Holliday v. Ketchum, MacLeod & Grove*, 584 F.2d 1221 (3d Cir. 1978); *Ginsberg v. Burlington Indus.*, 500 F. Supp. 696 (S.D.N.Y. 1980) (awarding attorneys' fees in accordance with agreement between plaintiff and his attorney).

Numerous other federal statutes also authorize the award of attorneys' fees to prevailing parties. See, e.g., 5 U.S.C. § 7701(g)(1) (1982) (Civil Service Reform Act); 15 U.S.C. § 2073 (1982) (Consumer Product Safety Commission Improvements Act); 17 U.S.C. § 505 (1982) (Copyrights Act). For a brief discussion of the Attorney's Fees Awards Act, which also authorizes the award of attorneys' fees to prevailing parties, see *supra* note 45.



abused its discretion.<sup>52</sup> To determine the value of a lawyer's service, an affidavit will suffice as proof.<sup>53</sup> There is no need for expert testimony since the judge is assumed to be an expert in this area.<sup>54</sup>

In a class action suit where the attorney who represented the class sought compensation out of the settlement award to class members who did not pursue the suit, the Third Circuit ruled that the district court should consider the following factors when determining compensation for an attorney: (1) the amount of the attorney's time expended in the effort; (2) the value of the attorney's services, to be ascertained by examining such factors as the normal billing rate and the attorney's reputation and status (partner, associate); (3) the "contingent nature of success"; and

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52. *Tranberg v. Tranberg*, 456 F.2d 173, 174 (3d Cir. 1972). In *Tranberg*, a lawyer appealed from an order of the district court denying reconsideration of an order setting his fees. *Id.* at 174. The appellate court ruled that the district court did not abuse its discretion in a partition suit. *Id.* The court stated that "the fee was set by an experienced district judge, knowledgeable of the circumstances and professional practices of the community." *Id.* See also *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1139 (11th Cir. 1984) (vacating district court's finding on attorneys' fees and remanding "in the hope that the parties and the court will together produce a record of adequate detail to permit meaningful and efficient review"); *Rothenberg v. Security Management Co.*, 736 F.2d 1470 (11th Cir. 1984) (fee award with instructions to district court to base its calculation upon adequate documentation); cf. *Sauers v. Commissioner*, 771 F.2d 64, 69-70 (3d Cir. 1985) (award by district court of damages pursuant to 26 U.S.C. § 6673).

In *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 54 U.S.L.W. 5017 (U.S. July 2, 1986), which involved an award of attorneys' fees pursuant to § 304(d) of the Clean Air Act, the Supreme Court stated, "A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute." *Id.* at 5022.

53. See, e.g., *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984) (district court properly relied on plaintiff's attorneys' affidavits demonstrating hours spent on case; court was entitled to include some hours spent unnecessarily); *Rothenberg v. Security Management Co.*, 736 F.2d 1470 (11th Cir. 1984) (counsel for defendants provided detailed affidavits itemizing services, and district court correctly relied on them in determining reasonable fees). Accord *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (courts may award attorneys' fees on basis of affidavits but evidentiary hearing was also required where facts to be weighed in light of judge's expertise were in dispute); *Tranberg v. Tranberg*, 456 F.2d 173 (3d Cir. 1972) (in awarding attorneys' fees, district judge properly relied upon itemized statement of time spent in conjunction with his knowledge of circumstances and professional practices of community). See also *Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 321 (1977) (for attorneys engaged in private practice, "the best evidence of the value of their time is the hourly rate which they most commonly charge their fee-paying clients for similar legal services").

54. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 170 (3d Cir. 1973).

(4) whether the attorney's work was exceptionally good or poor.<sup>55</sup> After setting a dollar value on the attorneys' services, the court ruled that "[a]bsent extraordinary circumstances, the unrepresented claimants should pay for the attorneys' services in proportion to their benefit from them—that is, the unrepresented claimants should pay a percentage of the reasonable value of the attorneys' services to the class equal to their percentage of the class' recovery."<sup>56</sup> The Third Circuit has held that these guidelines apply in all cases where attorneys' fees are granted by statute.<sup>57</sup>

With regard to referral fees, the Third Circuit has held that an agreement to pay referring counsel a percentage of the total attorneys' fees granted by the court, without regard to the amount of work performed by referring counsel, violates disciplinary rule 2-107 of the *Model Code of Professional Responsibility*.<sup>58</sup>

55. *Id.* at 167-69. *Lindy* was a multidistrict planning antitrust case. *Id.* at 163. After settlement, application was made for attorneys' fees and expenses. *Id.* at 164. The district court granted and denied this application in part. *Id.* On appeal, the Third Circuit, after developing the four-part analysis, vacated the orders granting and denying attorneys' fees and remanded the case for the district court to consider the four factors. *Id.* at 170. *But see* *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 54 U.S.L.W. 5017, 5022 (U.S. July 2, 1986) ("A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute.").

56. *Lindy Bros.*, 487 F.2d at 169.

57. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977). Other courts and commentators have suggested a similar analysis in deciding the reasonable value of attorneys' fees. *See, e.g.*, *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984) (calculating fees award based on hours spent and hourly rate charged); *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306 (5th Cir. 1979) (determining attorneys' fees based on hours worked, reasonable hourly rate, size of recovery, quality of work, and complexity of issues); *Berger*, *supra* note 53, at 315-28 (suggesting framework for determining attorneys' fee award based on time reasonably expended, multiplied by attorney's market rate, multiplied by risk of non-recovery).

58. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1019 (3d Cir. 1977) (citing 42 PA. CONS. STAT. ANN. (Purdon 1975)). The *Model Code of Professional Responsibility* provides:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
- (2) The division is made in proportion to the services performed and responsibility assumed by each.
- (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107, *reprinted in* 42 PA. CONS. STAT. ANN. (Purdon 1975). In *Prandini*, counsel for plaintiffs in a class action based on sex discrimination in employment filed an ex parte appeal from

B. *Liability of Counsel for Costs*

Under 28 U.S.C. § 1927, counsel may themselves be held liable for costs.<sup>59</sup> The Third Circuit has ruled that district courts

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an order of the district court reducing the fee payments they had settled upon with the defendants. 557 F.2d at 1017. The court stated that although the award of attorneys' fees is within the discretion of the trial court, district court judges must apply the formula devised in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.* *Id.* at 1018 (citing *Lindy*, 487 F.2d 161 (3d Cir. 1973)). The appellate court may then review the determination based on a clearly erroneous standard. *Id.*

The *Prandini* court rejected the appellants' argument that the district judge had focused erroneously on the amount it is ethical to agree upon rather than to receive. *Id.* at 1019 (citation omitted). The court stated that in disapproving the requested amount, the judge had passed upon the amount to be received. The court then vacated the judgment of the district court and remanded it for a determination based on the *Lindy* formula. *Id.* at 1022. *See also* Farmington Dowel Prods. Co. v. Foster Mfg. Co., 436 F.2d 699, 701 (1st Cir. 1970) ("The very fact that post-agreement factors such as complexity of problems, quality of work, and results obtained are properly considered indicates that the judgment of the court is directed at what amount it is ethical to receive, not at what share it is ethical to agree upon."). For a discussion of *Lindy*, see *supra* notes 54-56 and accompanying text.

59. 28 U.S.C. § 1927 (1982). This section provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

*Id.* For cases discussing § 1927, see *Dreiling v. Peugeot Motors*, 768 F.2d 1159 (10th Cir. 1985) (district court was justified in awarding costs as attorney continued to assert claims that had no factual or legal basis and commenced suit in bad faith); *United States v. Nesglo, Inc.*, 744 F.2d 887, 891-92 (1st Cir. 1984) (attorneys' fees award under § 1927 was "not only justified but virtually compelled by blatant conduct of appellants and their counsel"); *Malhiot v. Southern Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (damages of costs and attorneys' fees awarded under § 1927 where counsel's brief contained "many" misrepresentations of the record and intentional misstatements of California law), *cert. denied*, 105 S. Ct. 965 (1985); *Irizarry v. Quiros*, 722 F.2d 869 (1st Cir. 1983) (double costs awarded under § 1927 and rule 38 because of counsel's "persistence in attempting frivolous evidentiary defenses"). *Cf.* *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984) (case involved complicated interaction of state and federal law; court was unwilling to conclude that actions of counsel were sufficient to amount to bad faith justifying an award under § 1927); *United States v. Ross*, 535 F.2d 346 (6th Cir. 1976) (attorneys' conduct did not evidence a "serious and studied disregard for the orderly processes of justice"); *West Virginia v. Chas. Pfizer Co.*, 440 F.2d 1079 (2d Cir.) (imposition of sanctions unusual; no evidence of bad faith in record), *cert. denied*, 404 U.S. 871 (1971).

Section 1927 was amended in 1980. The original wording of the statute required only that counsel pay "excess costs." 28 U.S.C. § 1927 (1976), *amended by* 28 U.S.C. § 1927 (1980). This was construed narrowly to mean "taxable costs" as used in 28 U.S.C. § 1920. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759-61 (1980) (citing 28 U.S.C. § 1920 (1976)). In response to *Roadway Express*, Congress amended § 1927 to "broaden the range of increased expenses which an attorney who engages in dilatory litigation practices may be required

may use section 1927 as a basis for imposing sanctions where counsel has failed to prosecute,<sup>60</sup> and where counsel has advocated inconsistent positions within the same case.<sup>61</sup>

In *Baker Industries v. Cerberus, Ltd.*,<sup>62</sup> a district court assessed attorneys' fees, costs, and expenses against counsel under section 1927 for disregarding a clear and voluntary stipulation to accept as final a master's decision on certain issues.<sup>63</sup> By attacking the proceedings before the master, counsel "considerably extended a procedure which had the primary purpose of providing the par-

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by the judge to satisfy personally." Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 1980 U.S. CODE CONG. & AD. NEWS (1154 Stat.) 2716, 2782. For a further discussion of *Roadway Express*, see *infra* notes 66-67 and accompanying text.

60. *Titus v. Mercedes Benz*, 695 F.2d 746, 749 n.6 (3d Cir. 1982). In *Titus*, the Third Circuit considered whether the district court had abused its discretion in dismissing the appellant's claim with prejudice. *Id.* at 746-47. The district court based its decision upon reports of a United States magistrate showing that the plaintiff's counsel was consistently unprepared at pretrial conferences. *Id.* at 747. The district court never considered any less severe sanctions. *Id.* The Third Circuit noted that "district courts should be reluctant to deprive a plaintiff of the right to have his claim adjudicated on the merits." *Id.* at 747 (citations omitted). The court vacated the district court order and remanded the case for consideration of less severe sanctions. *Id.* at 746. In the course of its discussion of less severe sanctions, the court mentioned § 1927 as one remedy. *Id.* at 749 n.6.

61. *Bloom v. Barry*, 755 F.2d 356 (3d Cir. 1985). In *Bloom*, the plaintiff commenced a breach of warranty suit in a Florida state court. He also sought relief under the Magnuson-Moss Warranty Act. *Id.* at 356. Under this Act, federal question jurisdiction could only be obtained if the amount in controversy exceeded \$50,000. *Id.* (citing 15 U.S.C. § 2310(d)(3)(B) (1982)). The defendant had the case removed to the United States District Court for the Southern District of Florida by alleging diversity of citizenship and an amount in controversy exceeding \$10,000. *Id.* at 356-57 (citing 28 U.S.C. § 1332 (1982)). The Southern District of Florida transferred the case to the District of New Jersey upon the defendant's motion. *Id.* at 357.

After transfer, the defendant moved to dismiss the complaint for lack of federal subject matter jurisdiction. *Id.* The defendant claimed that the court lacked jurisdiction over the Magnuson-Moss Warranty Act claim because it was for less than \$50,000, and the state law breach of warranty claim could not result in a judgment in excess of \$10,000. *Id.* The District Court of New Jersey denied the motion to dismiss and remanded the case to a New Jersey Superior Court. *Id.* The plaintiff petitioned the Third Circuit for a writ of mandamus, directing the district court to vacate its order. *Id.* The court granted the petition. *Id.* at 358. In remanding the case to the district court to determine whether under Florida law the plaintiff could not recover over \$10,000, the court stated:

The odyssey to which Mr. Bloom and his counsel have been subjected as a result of the inconsistent positions taken by [the real defendant] with respect to the jurisdictional amount suggests that consideration by the district court of an award of excess costs, expenses and attorneys' fees pursuant to 28 U.S.C. § 1927 (1982) may be appropriate.

*Id.*

62. 570 F. Supp. 1237 (D.N.J. 1983).

63. *Id.* at 1238.

ties with a faster and less expensive way of resolving the significant disputes between them.”<sup>64</sup>

Courts have also used rule 38 and section 1927 in conjunction to award double costs against counsel.<sup>65</sup>

The Supreme Court has ruled that attorneys’ fees may be awarded against counsel as a “proper exercise of a court’s inherent powers.”<sup>66</sup> The Court ruled that this power should only be exercised when there is a finding that the action was filed in bad faith or the litigation was conducted in bad faith.<sup>67</sup>

#### IV. ITEMS TAXABLE IN THE COURT OF APPEALS

##### A. *Items Awarded as Costs of an Appeal*

Those items which a federal court may award as costs are listed in 28 U.S.C. § 1920.<sup>68</sup> This statute provides:

64. *Id.* at 1259.

65. See *Irizarry v. Quiros*, 722 F.2d 869 (1st Cir. 1983) (in conspiracy action, successful appellee was awarded double costs under rule 38 and § 1927 in view of defendant’s persistence in attempting frivolous evidentiary defenses); *Acevedo v. Immigration & Naturalization Serv.*, 538 F.2d 918, 920-21 (2d Cir. 1976) (court assessed double costs against petitioner’s counsel under rule 38 and § 1927 for filing petition as a delay tactic to prevent client’s deportation).

66. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). *Roadway Express* involved a sanction imposed on three lawyers who represented the plaintiffs in an employment discrimination suit. *Id.* at 754-56. The trial court dismissed the action under rule 37 of the Federal Rules of Civil Procedure for failure to comply with discovery orders. *Id.* at 755 (citing FED. R. CIV. P. 37). The trial court, relying on § 1927, also ordered the plaintiffs’ counsel to pay the defendant’s costs and attorneys’ fees. *Id.* at 756. The court of appeals reversed, holding that § 1927 was limited to court costs as defined by § 1920. *Id.* at 756-57. The Supreme Court affirmed the appellate court regarding § 1927, but remanded the case to the district court for a determination of whether the plaintiff’s attorneys acted in bad faith. *Id.* at 769.

67. *Id.* at 766. The Court discussed the inherent power of the federal courts to sanction attorneys, concluding that “[t]he power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes.” *Id.* (footnote omitted). See also *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955 (9th Cir. 1983) (citing *Roadway Express* in affirming district court’s taxing of attorneys’ fees against counsel who brought suit without valid claim); *TIF Instruments, Inc. v. Colette*, 713 F.2d 197, 201 (6th Cir. 1983) (attorney held liable under *Roadway Express* for a part of costs and attorneys’ fees awarded under rule 38 against client). See also *Bloom v. Barry*, 755 F.2d 356, 358 (3d Cir. 1985) (district court may award costs, expenses and attorneys’ fees pursuant to § 1927 against counsel for taking grotesquely inconsistent positions). For a critical discussion of *Roadway Express*, see Martineau, *supra* note 30, at 861-62. For a discussion of the effect of *Roadway Express* on 28 U.S.C. § 1927, see *supra* note 59. For a discussion of the award of attorneys’ fees as costs under rule 39, see *supra* note 45.

68. 28 U.S.C. § 1920 (1982).

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.<sup>69</sup>

Not all of the expenses listed in the statute will be awarded by a court of appeals. Under rule 39(e), certain appellate costs will be awarded in the district court.<sup>70</sup> The award of costs under rule 39(e) will occur after the appellate court mandate<sup>71</sup> has been issued. At that time, the district court, upon motion, will assess the costs specified in rule 39(e) in favor of the prevailing party.<sup>72</sup>

In *In re Penn Central Transportation Co.*,<sup>73</sup> the Third Circuit listed some allowable and unallowable appellate costs:

It has been the practice of this court to tax costs for

69. *Id.*

70. FED. R. APP. P. 39(e). For the text of rule 39(e), see *supra* note 1.

71. The appellate court mandate includes the appellate court's direction as to whom shall pay costs. FED. R. APP. P. 41(a). Rule 41(a) specifically provides that:

The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

*Id.*

72. FED. R. APP. P. 39(e). For the text of rule 39(e), see *supra* note 1. See also *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969) (cost of procuring copy of reporter's transcript is necessary cost under rule 39(e); court disallowed item as cost to be taxed in appellate court without prejudice to right of appellee to make motion to district court).

73. 630 F.2d 183 (3d Cir. 1980).

the printing of *filed* briefs, appendices, and exhibits. When traditional means of printing are employed, taxable expenses are deemed to include reasonable labor, materials, cover, binding, author's alterations not in excess of fifteen percent of the base price and special expenses. When other reproducing methods have been used, taxable expenses include materials and the duplicating charge . . . [however] labor is usually not taxable . . . . Docketing fees and state and local sales taxes are taxable items in this court. This court disallows costs for the following non-inclusive list of items: postage and courier fees, overtime, unreasonable author's alterations, motions, and "non-filed" documents.<sup>74</sup>

In addition, the costs of making documents available solely for the "information" of the court<sup>75</sup> and the costs of printed letters or motions are not taxable.<sup>76</sup> In general, attorneys' fees are likewise not taxable as costs.<sup>77</sup>

#### B. *Costs in Original Proceedings*

The question has arisen of how a court of appeals should treat costs in original proceedings such as mandamus actions or actions brought pursuant to the All Writs Statute.<sup>78</sup> In a Third Circuit mandamus decision, *Cotler v. Inter-County Orthopaedic Association*,<sup>79</sup> the court held that costs were allowable by the appellate court when the action was under the court's original jurisdiction.<sup>80</sup> Although rule 39 does not explicitly address the issue, *Cotler* held that the court would tax costs against real, but not nominal, parties.<sup>81</sup> The court drew an analogy with the situation in which a district court imposes costs pursuant to rule 54 of the

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74. *Id.* at 191 (emphasis in original) (footnote omitted).

75. *Id.* at 191 n.8.

76. *Id.*

77. For a discussion of attorneys' fees awarded as costs under rule 39, see *supra* notes 45 & 53-56 and accompanying text.

78. 28 U.S.C. § 1651 (1982). Section 1651(a) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* § 1651(a).

79. 530 F.2d 536 (3d Cir. 1976). For a further discussion of the facts in *Cotler*, see *supra* notes 15-16 and accompanying text.

80. 530 F.2d at 538.

81. *Id.*

Federal Rules of Civil Procedure.<sup>82</sup> In essence, the proceeding was the same as any appellate court action with the standard rules of taxation of costs applicable. The court concluded:

Costs may not be taxed against the nominal respondent, a judge. If this court dismisses the petition without requiring an answer, costs may not be assessed since the petitioner has not prevailed, and the actual respondent has incurred none. If an answer is required costs should be assessed, unless the court otherwise orders, in favor of the prevailing party: petitioner or actual respondent.<sup>83</sup>

The *Cotler* court ultimately allowed the petitioner an apportionment of his costs.<sup>84</sup>

### C. Amounts Awarded as Costs

The method for determining the actual dollar amounts to be awarded as costs for printing, copying, and the like is set by rule 39(c).<sup>85</sup> This rule provides that the costs of printing, or otherwise reproducing necessary copies of briefs, appendices, and the record are taxable at a rate which is not "higher than that generally charged for such work in the area where the clerk's office is located and [which] shall encourage the use of economical methods of printing and copying."<sup>86</sup>

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82. *Id.* (citing FED. R. CIV. P. 54(d)). Rule 54(d) of the Federal Rules of Civil Procedure provides:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

FED. R. CIV. P. 54(d).

83. 530 F.2d at 538. *See also In re Haight & Freese Co.*, 164 F. 688, 690 (1st Cir. 1908) (it is contrary to fundamental rule of protecting freedom of judicial action to tax costs against judge).

84. 530 F.2d at 538.

85. FED. R. APP. P. 39(c). For the full text of rule 39(c), see *supra* note 1.

86. FED. R. APP. P. 39(c). Rule 39(c) apparently supersedes the statutory provisions dealing with certain types of cases such as admiralty, 28 U.S.C. § 1925 (1982), and patent and customs litigation, 28 U.S.C. § 1926 (1982), which otherwise establish standardized schedules for fees and costs. *See Waterman Steamship Corp. v. Gay Cottons*, 419 F.2d 372, 374 (9th Cir. 1969) ("Since the adoption of the Federal Rules of Appellate Procedure, there is no provision for collecting proctor's docket fee in admiralty appeals."); *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126, 1128 (9th Cir. 1969) (court applied rule 39 to allow recovery of cost of printing of briefs). In general, attorneys' fees



Although rule 39 was revised in 1979 and again in 1986, for the most part the revisions have done little to affect the actual wording of the rule.<sup>87</sup> The rule changes have had a major impact, however, in shifting the initiative to the individual circuits to establish their own guidelines in determining these printing costs.<sup>88</sup> The 1979 revision also omitted the procedures for filing for costs, which were moved to (and now appear in) rule 39(d).<sup>89</sup>

Rule 39(c) establishes the highest rate that can be charged as costs for printing. The "lodestar" in setting that cost figure in the Third Circuit is Philadelphia, the city in which the clerk's office is located.<sup>90</sup>

The Third Circuit has held that a prevailing party may not

are not considered taxable costs of an appeal. There are, however, several exceptions to this rule. For a discussion of these exceptions, see *supra* note 45. For a discussion of the standards governing the award of attorney's fees, see *supra* notes 53-56 and accompanying text.

87. The pre-1979 version of rule 39(c) provided as follows:

(c) Costs of Briefs, Appendices, and Copies of Records. The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after entry of judgment.

Fed. R. App. P. 39(c) (amended 1979 and 1986). The 1979 revision resulted in the following wording:

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

Fed. R. App. P. 39(c) (as amended 1979) (amended 1986). For the current version of rule 39(c), see *supra* note 1.

88. See FED. R. APP. P. 39(c) (current version). See also FED. R. APP. P. 39(c) advisory committee note. The Advisory Committee's note states:

The proposed amendment would permit variations among the circuits in regulating the maximum rates taxable as costs for printing or otherwise reproducing briefs, appendices, and copies of records authorized by Rule 30(f). The present rule has had a different effect in different circuits depending upon the size of the circuit, the location of the clerk's office, and the location of other cities. As a consequence there was a growing sense that strict adherence to the rule produces some unfairness in some of the circuits and the matter should be made subject to local rule.

*Id.* For the text of the current version of rule 39(c), see *supra* note 1.

89. See FED. R. APP. P. 39(d). For the text of rule 39(d), see *supra* note 1.

90. See FED. R. APP. P. 39(c). See also *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980) (rule 39(c) permits taxation of costs of printing briefs at rates not higher than those charged in area of clerk's office). For the current text of rule 39(c), see *supra* note 1.

recoup the expense of an unreasonable number of copies, but that an award of the cost of thirty-five briefs is reasonable.<sup>91</sup> The Third Circuit has also held that the printing of briefs need not be at the lowest available price but that exorbitant printing costs as a retaliatory measure would be forbidden.<sup>92</sup>

Third Circuit Court Rule 17 lists the amounts the clerk will charge for various services.<sup>93</sup>

91. *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980). For a further discussion of *Penn Central*, see *supra* notes 73-76 and accompanying text.

92. *Penn Central*, 630 F.2d at 191.

93. 3d CIR. R. 17(2). Rule 17 provides, in pertinent part:

- (1) CERTIFICATION OR CERTIORARI TO SUPREME COURT. In all cases certified to the Supreme Court or removed thereto by certiorari or appeal, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.
- (2) SCHEDULE OF FEES AND COSTS. In pursuance of Section 1913 of Title 28, United States Code, and of the action of the Judicial Conference of the United States thereunder, the following table of fees and costs is established for this court:

For docketing a case on appeal or review or docketing any other proceeding, \$65. If the appeal is taken from a judgment of a District Court or the United States Tax Court, the docketing fee is to be paid to the Clerk of the District Court or the Clerk of the Tax Court as the case may be, at the time of filing the notice of appeal. When a joint notice of appeal has been filed pursuant to the provisions of Rule 3(b), Federal Rules of Appellate Procedure, there need be docketed only one appeal, but each party is entitled to file his own separate notice of appeal. If separate notices are filed, separate appeals shall be docketed. The provisions of this paragraph are not applicable in cases in which the appellant is proceeding in forma pauperis or in which the United States, an officer or agency thereof, is the appellant.

For making a copy (except a photographic reproduction) of any record or paper, \$1.00 per page of 250 words or fraction thereof. For reproducing any record or paper (by any means other than retyping), 50 cents per page. These fees do not include certification.

For comparing with the original thereof any copy of any transcript of record, entry, record or paper, when such copy is furnished by any person requesting certification, \$2.00 per page or fraction thereof. This fee is in addition to the fee for certification.

For certifying any document or paper, whether the certification is made directly on the document, or by separate instrument, \$2.00.

For every search of the records of the court and certifying the result of the same, \$2.00.

For each printed copy of any opinion, such copy to include all separate and dissenting opinions in a single case, regardless of whether such copy be certified or uncertified, \$2.00; Provided, That such charge shall not be made for:

- (a) Copies of opinions furnished to subscribers pursuant to paragraph (3) of this rule.

## V. SECURING APPELLATE COSTS

A. *How to Secure Costs*

Under the recent amendments to the Federal Rules of Appellate Procedure, rule 39(d) sets forth the method and procedure for seeking the taxation of costs.<sup>94</sup> In pertinent part, rule 39(d) provides, "A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within fourteen days after the entry of judgment."<sup>95</sup>

The request to tax costs should take the form of a motion to be filed with the court.<sup>96</sup> This assertion is based upon rule 27(a) of the Federal Rules of Appellate Procedure and its definition of a motion as "an application for an order or other relief."<sup>97</sup> A request that the court tax costs is a form of relief insofar as the moving party is concerned. Therefore, when filing this motion to tax costs, the filing party should adhere to all requirements of rule 27, and make sure to provide proof of service upon the opposing party or the party against whom the filing party is seeking

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- (b) Copies of opinions (one to each party) furnished each party of record in a particular case, or
  - (c) Copies of opinions furnished those appearing upon "Public Interest List" established by order of the court in the interest of providing proper and adequate media of dissemination to the general public.

*Id.*

94. See FED. R. APP. P. 39(d). For the text of rule 39(d), see *supra* note 1.

95. FED. R. APP. P. 39(d). For the complete text of rule 39(d), see *supra* note 1.

96. See *Oliver v. Michigan State Bd. of Educ.*, 519 F.2d 619, 620 (6th Cir. 1975) (order on *motion* to tax costs); *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969) (reviewing defendant's *motion* to tax costs).

97. FED. R. APP. P. 27(a). Rule 27(a) specifically provides:

Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

*Id.*

to impose costs.<sup>98</sup>

The disposition of the motion to tax costs will be handled by the clerk's office. An absolute requirement of rule 39(d) is that the motion contain an "itemized and verified bill of costs."<sup>99</sup> This should either be attached separately to the motion, or included within the motion itself. In the latter case, the motion should be submitted in an affidavit form in order to satisfy the verification requirement of rule 39(d). All receipts for allowable costs should be appended to the motion.

Rule 39(d) is silent as to who grants the motion to tax costs. A fair reading of rule 39(d) indicates, however, that the clerk will both grant the request for costs and determine the allowable costs. This seems consistent with the requirement of rule 39(d) that the clerk is primarily responsible for having a certified statement of costs included in the mandate, either before or after its issuance.<sup>100</sup> If the motion to tax costs is opposed, however, then the court will decide the contested issue.<sup>101</sup>

The Third Circuit has held that under certain circumstances the clerk is without power to determine expenses, and that the issue is one for the court to determine. In one case, the court ruled that the following three circumstances in combination required court action: (1) the presence of substantial printing costs; (2) the presence of issues requiring legal determinations; and (3) circumstances such that the results of the motion depend upon legal and discretionary considerations.<sup>102</sup>

### B. *Proper Time for Filing Motion to Tax Costs*

The motion to tax costs should be filed within fourteen days of the court's decision or judgment.<sup>103</sup> This fourteen-day period allows the clerk to include the cost assessment in the mandate,<sup>104</sup>

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98. See FED. R. APP. P. 27(a).

99. FED. R. APP. P. 39(d). For the text of rule 39(d), see *supra* note 1.

100. See D. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 10.2, at 115 (1981) ("The court or its clerk decides what costs to allow and includes those in the mandate.").

101. See *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980) (courts intervene when necessary); *Murphy v. L & J Press Corp.*, 577 F.2d 27 (8th Cir. 1978) (court of appeals reversed and plaintiff submitted bill of costs; defendant objected and sought to strike same).

102. *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 186 (3d Cir. 1980). For a further discussion of the *Penn Central* case, see *supra* notes 73-76 & 91-92 and accompanying text.

103. FED. R. APP. P. 39(d). For the text of rule 39(d), see *supra* note 1.

104. FED. R. APP. P. 39(d).

which is not issued until twenty-one days after entry of the judgment.<sup>105</sup> The fourteen-day time period may be extended by the court.<sup>106</sup> The party requesting the extension must file an appropriate motion to that effect. A motion to extend the time for filing the bill of costs should be timely filed; that is, within the fourteen-day time period after the court's entry of judgment.

The court, however, within its discretion may allow such a motion to extend the time for filing the bill of costs to be filed out-of-time.<sup>107</sup> The United States Court of Appeals for the District of Columbia, in *Laffey v. Northwest Airlines*,<sup>108</sup> stated that such a motion would be granted upon "good cause shown."<sup>109</sup> *Laffey* also clearly stated that the fourteen-day filing period began to run from the date judgment was entered; filing of a petition for rehearing or hearing in banc would not toll that time period without some further order of the court.<sup>110</sup>

### C. Objection to Taxing Costs

The party from whom the costs are sought may object to the assessment or the amount of the assessment, even if some costs are due.<sup>111</sup> Whether certain items are taxable as costs is a ques-

105. FED. R. APP. P. 41(a). For the full text of rule 41(a), see *supra* note 71.

106. See *Saunders v. Washington Metropolitan Area Transit*, 505 F.2d 331 (D.C. Cir. 1974) (allowing bill to be filed late as losing party did not send copy of bill for printing of joint appendix to prevailing party for several months). Cf. *Stern v. United States Gypsum, Inc.*, 560 F.2d 865 (7th Cir. 1977) (filing of petition for rehearing did not automatically extend time for filing; counsel's good faith belief as to timeliness was not "good cause" for extension), *cert. denied*, 434 U.S. 975 (1977); *Denofre v. Transportation Ins. Rating Bureau*, 560 F.2d 859 (7th Cir. 1977) (enlargement of time denied, good cause not shown by mere inattendant to daily chores at law office).

Inherent power to extend time frames under the Federal Rules of Appellate Procedure is found in rule 26(b), which allows a court to enlarge time periods for "good cause shown." FED. R. APP. P. 26(b).

107. See *Laffey v. Northwest Airlines*, 587 F.2d 1223 (D.C. Cir. 1978). For a further discussion of *Laffey*, see *infra* notes 108-10 and accompanying text.

108. 587 F.2d 1223 (D.C. Cir. 1978).

109. *Id.* at 1223. In *Laffey*, the precipitating litigation was a class action alleging that Northwest Airlines had discriminated against female employees. *Id.* (citations omitted). The district court ruled in favor of the plaintiffs and the appellate court affirmed and remanded for further proceedings. *Id.* Northwest petitioned for rehearing. *Id.*

110. *Id.* at 1224. Counsel for the plaintiffs did not file the bill of costs on time, believing that timeliness would be measured from disposition of the petition for rehearing rather than from the date of judgment. *Id.* The bill of costs was finally tendered 11 months from the date of judgment. *Id.* at 1224. The court disagreed with plaintiffs' counsel. *Id.* Accord *Stern v. United States Gypsum, Inc.*, 560 F.2d 865, 866 (7th Cir. 1977) (good cause standard not met by counsel's belief in timeliness), *cert. denied*, 434 U.S. 975 (1977).

111. See *In re Penn Cent. Transp. Co.*, 630 F.2d 183 (3d Cir. 1980) (after

tion of law; the dollar amount of costs awardable for allowable items is a question of fact.<sup>112</sup>

Prior to the August 1979 amendment to rule 39(d), there were no provisions in the Federal Rules of Appellate Procedure

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considering objections to bill of costs awarded for appeals in railroad reorganization proceedings, court modified costs for printing appendices); *Murphy v. L & J Press Corp.*, 577 F.2d 27 (8th Cir. 1978) (on appeal of denial of successful appellant's bill of costs, court assessed only one half of transcript fee against appellee as appellant was partially to blame for failure to file transcript); *Oliver v. Michigan State Bd. of Educ.*, 519 F.2d 619 (6th Cir. 1975) (cost of producing joint appendix properly taxed as costs against appellant but on appeal of assessment of costs, court taxed cost of printing portion which appellee unnecessarily designated to be included therein against appellee); *Delta Air Lines v. Civil Aeronautics Bd.*, 505 F.2d 386 (D.C. Cir. 1974) (court denied petitioner's motion for disallowance of intervenor's bill of costs as clerk of court properly awarded costs in accordance with method used in other circuits by treating intervenors as any other prevailing party).

112. *City of Orlando v. Murphy*, 94 F.2d 426 (5th Cir. 1938). In *Murphy*, the prevailing party on appeal had filed a motion to retax costs in the district court. *Id.* at 431. The prevailing party appealed the district court's denial of this motion. *Id.* The nonprevailing party on the appeal of the merits moved to dismiss the appeal of the prevailing party on the ground that it concerned only costs. *Id.* The appellate court denied the motion to dismiss, stating that the prevailing party's appeal raised a question of law: whether certain items are taxable as costs. *Id.* at 431-32. The court distinguished this from an appeal of a question of fact, which involves discretion as to amounts. *Id.* The court also noted that since the Fifth Circuit had rendered a judgment on the merits and had ordered the costs in the controversy taxed, it retained jurisdiction over the appeal. *Id.* The court remanded the case to the district court to tax the costs of the transcript and the printing costs incurred by the prevailing party on the appeal of the merits against the nonprevailing party. *Id.* at 433.

The Supreme Court has also stated:

The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute and should not be enforced when the trial court assumes the power to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed.

*Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83 (1924).

In *Newton*, the court was faced with the question of whether premiums for bonds paid by a party litigant under an order of the court prior to litigation can be taxed as costs against the nonprevailing party. *Id.* at 84. The court concluded that the award of such costs was appealable as it involved a question of law as opposed to a question of the court's discretion. *Id.* The court concluded that the district judge had properly taxed such costs against the nonprevailing party. *Id.* at 85. See also *Trustees v. Greenough*, 105 U.S. 527 (1881) (appeal allowed from decree in equity solely for costs when the question was whether they could properly be paid out of fund in control of court); *Delta Air Lines v. Civil Aeronautics Bd.*, 505 F.2d 386 (D.C. Cir. 1974) (appeal considered nonprevailing party's motion for disallowance of intervenor's bill of costs).

for opposing a motion to tax costs. Case law, however, allowed a party to oppose a request to tax costs. The case law procedure required an opposing party to counter with its own motion, and to file it within seven days after service of the original motion to tax costs.<sup>113</sup> This seven-day period was derived from the time frame set forth in rule 27(a) of the Federal Rules of Appellate Procedure for the filing of responsive motions in opposition.<sup>114</sup>

The recent amendment to rule 39(d) incorporated the practice followed in most of the circuits. The rule now provides that "[o]bjections to the bill of costs must be filed within ten days of service on the party against whom costs are to be taxed unless the time is extended by the court."<sup>115</sup> Rule 39(d) permits an extension to this ten-day period in a fashion similar to the extensions allowed for initially filing the motion to tax costs.<sup>116</sup>

#### D. *Costs Included in the Mandate*

As a general rule, the mandate will include an itemized statement of the costs that have been taxed in the court of appeals.<sup>117</sup> Rule 39(d), in pertinent part, provides:

The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to

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113. See 9 J. MOORE & B. WARD, *MOORE'S FEDERAL PRACTICE* § 239.02[4] & n.2 (1985) (prior to 1979 amendment to rule 39(d), absence of specific provision for filing objections created problem of whether objections filed in form of motion would require delay of seven days awaiting objections in opposition pursuant to FED. R. APP. P. 27(a)). See also FED. R. APP. P. 39(d) advisory committee note (present rule makes no provision for objections to bills of costs but proposed 1979 amendment would allow 10 days for such objections).

114. See FED. R. APP. P. 27(a) ("Any party may file a response in opposition to a motion other than one for a procedural order . . . within 7 days after service of the motion. . . .").

115. FED. R. APP. P. 39(d).

116. *Id.* For the text of rule 39(d), see *supra* note 1.

117. See FED. R. APP. P. 41(a). Rule 41(a) describes the contents of the circuit court's mandate and provides, in pertinent part: "A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue." *Id.* For the entire text of rule 41(a), see *supra* note 71.

the clerk of the district court.<sup>118</sup>

The intent of rule 39(d) is to have the cost statement included in the mandate. The fourteen-day period allowed for filing the initial motion to tax costs was established in order to allow time for the clerk to include the cost statement with the mandate. Of course, when an objection to the requested costs is filed, the cost statement may not be included in the mandate.<sup>119</sup> Even with a timely filing of the cost request and without any opposition, the complexity of certain types of litigation sometimes requires a delay in the actual ascertainment of the costs. Further, whenever an extension of time is granted to file the motion to tax costs, the costs will, of course, not be included with the mandate.<sup>120</sup>

Former rule 39(d) implied that the mandate should not be withheld pending the assessment of appellate costs. This rule provided that the cost statement could be added at any time after the mandate had been issued.<sup>121</sup> The amended rule 39(d) states explicitly that "the issuance of the mandate shall not be delayed for taxation of costs. . . ."<sup>122</sup> Once the mandate has been issued, the clerk shall request the district court clerk to make the cost statement part of the mandate;<sup>123</sup> since the mandate has already been deposited in the district court, it seems reasonable to have the requested addition directed towards that clerk. This specification makes clear the procedure for including the cost statement in the mandate once it has been issued. These procedures similarly would be applicable under rule 39(d) if the bill of costs, originally included in the mandate, later was sought to be amended.<sup>124</sup>

## VI. COSTS OF APPEAL TAXABLE IN THE DISTRICT COURT

There are certain costs arising in an appeal that are assessed and taxed by the district court from which the appeal was taken. The determination and award of such costs are within the discretion of the district court.<sup>125</sup> Therefore, upon issuance of the

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118. FED. R. APP. P. 39(d). For the entire text of rule 39(d), see *supra* note 1.

119. For a discussion of objecting to awards for costs, see *supra* notes 103-10 and accompanying text.

120. For cases discussing extensions of time for filing the motion to tax costs, see *supra* note 106.

121. FED. R. APP. P. 39(d). For the text of note 39(d), see *supra* note 1.

122. *Id.*

123. *Id.*

124. *Id.*

125. See *Guse v. J.C. Penney Co.*, 570 F.2d 679 (7th Cir. 1978) (in connec-



court's mandate, counsel will have to move in the district court for taxation of the costs permitted by rule 39(e).<sup>126</sup> They will not be included in the Third Circuit's mandate.<sup>127</sup>

Rule 39(e) specifically lists those costs which, although incurred on appeal, must be recovered in the district court.<sup>128</sup> Because these are considered costs of the appeal, they are controlled by the Federal Rules of Appellate Procedure. Rule 39(e) permits the district court to impose as appellate costs the following items: (1) the cost of preparation and transmission of the record on appeal;<sup>129</sup> (2) the cost of the court reporter's transcript if necessary to the determination of the appeal;<sup>130</sup> (3) the premiums paid for

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tion with Seventh Circuit's reversal in sex discrimination case, order providing "costs on appeal" was limited to costs taxable in appellate court; district court given discretion to tax costs taxable in its court); *Lloyd v. Lawrence*, 60 F.R.D. 116 (S.D. Tex. 1973) (district court awarded costs upon application of defendant when court of appeals reversed summary judgment for plaintiff and remanded for further proceedings). See also *D. KNIBB*, *supra* note 100, § 10.2, at 117 ("costs of appeal enumerated in Rule 39(e), are taxable in the district court . . . for general convenience because the district court has better access to information regarding them"). For a general discussion of the district court's discretion in assessing costs, see *C. WRIGHT & A. MILLER*, *supra* note 10, § 2668. For the text of rule 39(e), see *supra* note 1.

126. See *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969) (cost of reporter's transcript, if necessary for determination of appeal, disallowed as cost to be taxed on appeal; however, appellee had right to move for such cost in district court). Cf. *Hill v. Tennessee Valley Auth.*, 84 F.R.D. 226 (E.D. Tenn. 1979) (plaintiffs were not entitled to award in district court for printing cost on appeal since those costs were not awarded by appellate court).

127. See *Bourazak v. North River Ins. Co.*, 280 F. Supp. 87 (S.D. Ill. 1968) (mandate of appellate court simply affirmed with "costs"; district court taxes these costs and clerk inserts amount in mandate); 9 J. MOORE & B. WARD, *supra* note 113, § 239.02 (1985) (items set forth in rule 39(e) will not be included in cost statement attached to mandate; prevailing party on appeal must apply to district court).

128. FED. R. APP. P. 39(e). For the full text of rule 39(e), see *supra* note 1.

129. FED. R. APP. P. 39(e). See also *Waterman Steamship Corp. v. Gay Cottons*, 419 F.2d 372 (9th Cir. 1969) (in admiralty case, fee of clerk for copy of record on appeal is taxable in district court); *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969) (district court should only award actual amount paid by appellee to court reporter for copy of transcript on appeal; court should not award cost of duplication); *City of Orlando v. Murphy*, 94 F.2d 426 (5th Cir. 1938) (cost of printing record allowed by court prior to promulgation of federal rules).

130. FED. R. APP. P. 39(e). See also *Hodge v. Hodge*, 507 F.2d 87, 93 n.19 (3d Cir. 1975) (three volumes of testimony necessary on appeal should be taxed in district court); *Waterman Steamship Corp. v. Gay Cottons*, 419 F.2d 372 (9th Cir. 1969) (in admiralty case, cost of reporter's transcript is fixed by district court); *City of Orlando v. Murphy*, 94 F.2d 426, 452 (5th Cir. 1938) (cost of transcript shall be fixed by district court "whose officers are the ones informed thereon"); 28 U.S.C. § 1920 (1982) (listing items clerks and judges of United States courts may tax as costs).

Rule 39(e) allows the costs of the court reporter's transcript where "neces-

the cost of supersedeas or other bonds that preserve rights pending appeal;<sup>131</sup> and (4) the cost of filing the notice of appeal.<sup>132</sup>

## VII. HOW TO PAY COSTS

To determine what appellate costs have been imposed, it is necessary to look first to the Third Circuit's mandate and also to whatever costs of appeal have been taxed in the district court. Added together, both are payable as part of the judgment, as a general matter, exclusively to the prevailing party. Thus, the imposition of costs upon one party acts as part of the judgment and compensates the other party for the expenses incurred in having to bring or defend the appeal, as the case may apply.

## VIII. FORM FOR REQUESTING COSTS

The following is a Third Circuit form for requesting basic costs of an appeal. Completion of the form will serve as the means of obtaining reimbursement in some cases. In many cases, however, the form will not be adequate for listing all the costs of the appeal. In cases where the form is not adequate, it will serve as a starting point in assembling the costs of an appeal and in drafting a petition seeking an award of the costs of appeal.

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sary" to the appellate decision. FED. R. APP. P. 39(e). For a discussion of what constitutes "necessary" in this situation, see *Knutson v. Metallic Slab Form Co.*, 132 F.2d 231 (5th Cir. 1942). See also *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969) (in appeal not taken *in forma pauperis*, cost of providing copy of reporter's transcript is "necessary").

131. FED. R. APP. P. 39(e). See also *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 84-86 (1924) (allowing premiums paid on bonds to be taxed by district court in equity suit); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir. 1937) (premiums on supersedeas bonds recallable in district court after order of reversal); *Lloyd v. Lawrence*, 60 F.R.D. 116 (S.D. Tex. 1973) (\$522 premium on supersedeas bond is taxable in district court under rule 39(c)). Cf. *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953) (prevailing party only recovered one-half costs on appeal because party printed unnecessarily large transcript).

In *Trans World Airlines v. Hughes*, 515 F.2d 173 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), the court affirmed the district court's award, under rule 39(e), of costs incurred by appellants protecting the judgment on appeal by securing the judgment in lieu of a supersedeas bond. 515 F.2d at 179. The court stated: "We fail to see how the court's wise exercise of its discretion in an unusual case not to require security by way of a bond may be used to justify the disallowance of the costs of procuring alternate security for the appeal." *Id.* at 177.

132. FED. R. APP. P. 39(e). See also *Lloyd v. Lawrence*, 60 F.R.D. 116, 120 (S.D. Tex. 1973) (successful party may recover \$5.00 fee for filing notice under rule 39(e)).

**UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT BILL OF COSTS**

versus

No. \_\_\_\_\_

The Clerk is requested to tax the following costs  
against \_\_\_\_\_

COURT COSTS TAXABLE UNDER RULE 39 FRAP*	REQUESTED	
Docketing Fee		
Cost of Printing Appendix		
Costing of Printing Appellant's Brief		
Costs of Printing Appellee's Brief		
Cost of Printing Appellant's Reply Brief		
Total-----		

\*An itemized statement from the printer showing the actual cost per page for reproducing the brief and appendix is to be attached to the bill of costs.

I, \_\_\_\_\_ do swear that the foregoing costs are correct and were necessarily incurred in this action. A copy was mailed on \_\_\_\_\_ to opposing counsel.

\_\_\_\_\_  
(signature)

Attorney for \_\_\_\_\_